No. 2891

United States Circuit Court of Appeals

For the Ninth Circuit.

ED JOHNSON and A. C. LAIRD,
Plaintiffs in error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States District Court of the District of Alaska, Second Division.

GEORGE B. GRIGSBY
HUGH O'NEILL,
Attorneys for Plaintiffs in Error.

ALASKA DAILY EMPIRE

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STATEMENT OF THE CASE.

The plaintiffs in error were convicted in the United States District Court for the District of Alaska, on the first day of May, 1916, for the crime of gambling. The offense was alleged in the indictment to have been committed on the 5th day of January, 1916, in the Town of Nome, Alaska. Plaintiffs in error and other persons were arrested on the said 5th day of January, 1916, and charged with the offense of gambling by playing games of cards called "Stud poker" and "Pangingui."

The defendants were brought into the Commissioner's Court and demanded a jury trial, but on motion of the U. S. Attorney the U. S. Commissioner proceeded to conduct what is known as a preliminary hearing, over and above the objection of the attorney for the defendants, and after hearing evidence on the part of the government, proceeded to bind over all the defendants with the exception of three, to await the action of the District Court.

It will be contended in this brief that the U. S. Commissioner was without jurisdiction to bind the defendants over as aforesaid, but that it was his duty to have proceeded to try the cases as Justice of the Peace, and that the hearing at the Commisioner's Court, did, in fact, constitute a trial and that such trial constituted jeopardy of the defendants. The plea of former jeopardy was entered to the indictment, also a motion to quash the indictment, on the ground of the former jeopardy, was made by the plaintiffs in error, which motion was overruled by the District Court. The District Court also refused to allow evidence to be admitted to sustain the plea of former jeopardy.

The first trial of the case in the District Court resulted in a mistrial. On the second trial plaintiffs in error were convicted.

The evidence at the first trial consisted principally of the testimony of the witness N. B. Nelson, who testified that he gambled with the defendants at the time and place charged in the indictment and

that he was furnished with money by the United States Marshal for this purpose and was paid for his services in so doing the sum of Sixty-Five Dollars. The United States Marshal testified that he had, in fact, paid the witness Nelson the sum of $65, from his own personal money. The jury having disagreed, a new trial was ordered and on the second trial the jury panel became exhausted so that it became necessary to issue a special venire in order to complete the jury. Counsels for plaintiffs in error objected to the summoning of the jury by the United States Marshal on the ground of his personal interest in the case, setting up the foregoing facts by affidavit, and moved the Court that a special elizor be appointed to summon the jurors. This motion was not granted but the United States Marshal selected the jury.

Error is assigned upon the refusal of the Court to appoint a special officer to select the jury.

Error is also assigned upon the refusal of the Court to sustain a challenge made by the defendants to the juror W. H. Pearson on the ground of actual bias. The testimony of Pearson is set forth in full in the transcript of record and will be adverted to later.

After the first trial of the case the trial was postponed numerous times upon motion of the District Attorney on the alleged ground that the United States was unable to procure the attendance of cer-

tain witnesses. The defendants were compelled to appear almost daily in court for a period of several weeks and the case continued from day to day upon the statement of the District Attorney that certain witnesses could not be found and frequently the District Attorney insinuated that defendants, or their counsel, were responsible for the absence of the government witnesses, which undoubtedly created a prejudice against the defendants in the minds of the jury and spectators. Error is assigned upon the refusal of the Court to proceed with the trial upon motion of the defendants.

Error is also assigned upon several rulings of the Court with respect to admission or rejection of evidence, as will more fully appear in the specifications of error. Also there are several assignments of error on the instructions of the court and refusal to give instructions, particularly with reference to the witness N. B. Nelson whom the plaintiffs in error contend was an accomplice according to his testimony, and whose testimony, unless corroborated, would, under the laws of Alaska, be insufficient to sustain a conviction.

SPECIFICATIONS OF ERROR RELIED UPON.

I.

That the court erred in overruling the defendants' motion to quash the indictment in this case.

Assignment of Error No. II. (Tr. p. 169.)

II.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of the case from April 17, 1916 until April 18, 1916.

Assignment of Error No. III. (Tr. p. 172.)

III.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 18, 1916, until April 19, 1916.

Assignment of Error No. IV. (Tr. p. 172.)

IV.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 19, 1916, until April 20, 1916.

Assignment of Error No. V. (Tr. p. 173.)

V.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 20, 1916, until April 21, 1916.

Assignment of Error No. VI. (Tr. p. 173.)

VI.

That the court erred in sustaining the motion of the U. S. Attorney for a continuance of this case from April 21, 1916, until April 24, 1916.

Assignment of Error No. VII. (Tr. p. 173.)

VII.

That the court erred in sustaining the motion

of the U. S. Attorney for a continuance of this case from April 24, until April 26, 1916.

Assignment of Error No. VIII. (Tr. p. 173.)

VIII.

That the court erred in overruling the motion of the defendants herein that a special officer be appointed to serve the special venire issued herein upon the 26th day of April, 1916.

Assignment of Error No. IX. (Tr. pp. 173, 174, 175, and 176.)

IX.

That the court erred in denying and overruling the challenge for cause made by the defendants to the juror W. H. Pearson.

Assignment of Error No. X. (Tr. pp. 176, 177, and 178.)

X.

That the court erred in denying and overruling the application of the defendants to exercise a fourth and additional peremptory after the defendants had exhausted the peremptory challenges allowed by law.

Assignment of Error No. XI. (Tr. p. 178.)

XI.

That the court erred in refusing to compel the witness E. R. Jordan to answer a certain question propounded to him by the defendants, as follows:

"Q. How did you employ Nelson and in what respect?

A. I told him to go down and look up any gambling and report to the office. I did that in my official capacity.

Q. Why did you pay him out of your private funds?

A. That is my business.

MR. O'NEILL: Now, if your Honor please, I am not going to stand for the impudence of this witness.

THE COURT: I don't think the witness is impudent. Take your seat. He has a right to pay his own money if he wants to.

MR. O'NEILL: I have a right to know why he paid his own money to show the animus of the witness, if any there be.

THE COURT: He has stated because he chose to do so.

MR. O'NEILL: He said it was his business. I want to know why he chose to do so."

Assignment of Error No. XIX. (Tr. pp. 183 and 184.)

XII.

That the court erred in overruling the objection made by the defendants to the following testimony of the witness Wm. Dougherty, testifying on behalf of the Government, to-wit:

"Some time prior to the 5th of January, 1916, the defendant, Ed Johnson, in my presence, made a statement as to his intention with reference to carrying on gamb-

ling here in Nome. He said he was going to gamble, he intended to gamble.'

MR. GRIGSBY: I didn't notice the question, if your Honor please. I ask leave to have an objection entered on the ground it is too remote, doesn't tend to show whether or not the crime was committed on the 5th of January, as charged in the indictment.

THE COURT: Objection noted and overruled.

WITNESS: (Continuing) That statement was made somewhere along in October, 1915.

MR. GRIGSBY: We move that the answer be stricken out as fixing the time too remote to have any bearing on this case.

THE COURT: Overruled."

Assignment of Error No. XX. (Tr. pp. 184 and 185.)

XIII.

That the court erred in overruling the objection made by the defendant to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

"Q. And what did you report to him?

MR. GRIGSBY: Objected to as calling for a conversation not in the presence of the defendants, or any of them.

THE COURT: Overruled.

A. I reported that there was gambling down in the Arctic Billiard Hall and he

could get them and then I went back and got into the game again."

Assignment of Error No. XXI. (Tr. p. 185.)

XIV.

That the court erred in overruling the objection of the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

Q. Now, with reference as to who was present at your table, I will ask you if this gentleman sitting behind me was at your table. (Counsel turns and points to one of the defendants.)

MR. GRIGSBY: Objected to as leading, if the court please.

THE COURT: Overrule the objection.

A. He was."

Assignment of Error XXII. (Tr. pp. 185 and 186.

XV.

That the court erred in overruling the objection made by the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

"Q. Had you ever been up there before and seen them gambling?

MR. GRIGSBY: Objected to as calling for proof of another offense, and prejudicial.

THE COURT: Overrule the objection.

A. I had seen them gambling pretty near every night for a week, playing 'stud poker' and 'pangingui.' "

Assignment of Error No. XXIII. (Tr. p. 186.)

XVI.

That the court erred in overruling the objection of the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

"Q. From whom did you buy chips at those previous games?

MR. GRIGSBY: Objected to as being proof of another offense not connected with the crime charged in the indictment.

THE COURT: Overruled.

A. Whoever might be running the game."

Assignment of Error No. XXIV. (Tr. pp. 186 and 187.)

XVII.

That the court erred in overruling the objection made by the defendants to the following question propounded to the witness N. B. Nelson, testifying on behalf of the Government:

Q. Did you buy any from Mr. Johnson?

MR. GRIGSBY: Objected to as leading.

THE COURT: Overrule the objection." I think I did."

Assignment of Error No. XXV. (Tr. p. 187.)

XVIII.

That the court erred in sustaining the objection

made by the Government to the following questions propounded by the defendants to the witness N. B. Nelson on cross-examination:

Q. Have you ever done what is called 'stool-pigeoning' before?

MR. SAXTON: Object to that.

THE COURT: Objection sustained."

Assignment of Error No. XXVI. (Tr. p. 187.)

XIX.

That the court erred in sustaining the objection made by the Government to the following questions propounded by the defendants to the witness N. B. Nelson on cross-examination:

"Q. Have you ever done any Gum-shoeing'?

MR. SAXTON: We object to 'gum-shoeing.'

THE COURT: Objection sustained."

Assignment of Error No. XXVII. (Tr. pp. 187 and 188.)

XX.

That the court erred in refusing to permit the defendants to ask certain questions of the witness, N. B. Nelson on cross-examination, as follows:

"Q. Have you ever acted as an informer before?

A. I don't really know the meaning of your term.

Q. Do you understand what the term 'stool-pigeon' means?

A. Yes, sir.

MR. GRIGSBY: I will ask permission to use the language the witness understands, if the Court please.

THE COURT: Overrule the permission."

Assignment of Error No. XXVIII (Tr. p. 188.)

XXI.

That the court erred in sustaining the objection made by the Government to the following question propounded by the defendants to the witness N. B. Nelson on cross-examination:

"Q. Didn't you testify in your former examination on the former trial of this case that all he told you to do was to look up gambling in the town of Nome and report to Phil Holland?

MR. SAXTON: We object to this. This is reduced to writing and signed by the witness and it is improper to ask this witness what he testified to on the former examination without exhibiting to him the writing."

And thereupon, after argument, the court refused to permit counsel to ask the above question without first exhibiting to the witness a paper purporting to be the written transcript of his testimony, to which ruling of the court the defendants then and there excepted and an exception was allowed.

Assignment of Error No. XXIX. (Tr. pp. 188 and 189.)

XXII.

That the court erred in refusing to permit the defendants to ask the witness N. B. Nelson the following question on his cross-examination without first exhibiting to him a paper purporting to be a transcript of his testimony at the former trial, as follows:

> "Q. (By Mr. Grigsby:) Now did you at that former trial make the following answer to the following question? (Using transcript of the testimony furnished by Mr. Saxton.) 'Q. Who else was sitting at the table you were sitting at? A. Mr. Laird and myself, Mr. Adams and that man they call the tamale man, Mr. Pierson, and I think the fellow we call "Rube" Johnson, but I am not certain about him.' Did you make that answer?
>
> MR. SAXTON: We ask that this writing be exhibited to the witness.
>
> THE COURT: Show it to him, Mr. Grigsby.
>
> MR. GRIGSBY: We object to such procedure.
>
> THE COURT: Overruled.
>
> (Mr. Grigsby shows transcript to witness.)
>
> Q. Did you make that answer?
>
> A. I did."

Assignment of Error No. XXX. (Tr. p. 189.)

XXIII.

That the court erred in refusing to permit de-

fendants to propound the following questions to the witness, N. B. Nelson on cross-examination without his showing him the paper purporting to be a transcript of his testimony at the former trial of this case:

> "Q. Did you on the former trial of this case testify as follows: (Referring to the stud-poker table.) 'Q. Was Nick Skorlick at the table? A. I could not positively state, I am not sure, I think he was.' Did you so answer, did you so state? Can you answer this without looking at this paper?
>
> A. I can.
>
> MR. SAXTON: I object unless the paper is shown to the witness and he can see what his answer was and what the question was.
>
> THE COURT: Show him the paper, Mr. Grigsby.
>
> Q. (Mr. Grigsby continuing after showing witness transcript.) Did you so answer?
>
> A. Yes, sir.
>
> Q. And you answered a minute ago he was not?
>
> A. I don't think he was. I don't know what has happened to change my recollection of it since the former trial."

Assignment of Error No. XXXI. (Tr. p. 190.)

XXIV.

That the court erred in admitting in evidence

a certain stipulation offered by the Government, as follows:

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, SECOND DI VISION.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ED JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN NOVOSEL, NICK SKORLICH, ALFRED PIERSON, ADELBERT G. GUMAER,
Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys as follows:

1. That after diligent effort the United States is not able to produce, at the trial of this cause, the following witnesses, to wit, A. Hanson and Elmer Adams.

2. That each of said witnesses, if produced as a witness on the trial of this cause, would refuse to testify to any of the material facts in this cause upon the ground that such evidence would tend to incriminate himself.

3. That this stipulation may be considered in evidence and read to the jury upon the trial of this cause.

F. M. SAXTON,
United States Attorney.

G. B. GRIGSBY,
HUGH O'NEILL.
Attorneys for Defendants.

To which the defendants objected upon the ground that the said stipulation was immaterial, which objection was overruled by the court and an exception allowed defendants to said ruling.

Assignment of Error No. XXXIII. (Tr. pp. 191 and 192.)

XXV.

That the court erred in sustaining the motion made by the government to strike out certain testimony and in sustaining the objection made by the Government to said testimony of the witness Merrill Beatty, a witness testifying on behalf of the defendants, as follows:

"Q. I will ask you to state whether or not in that conversation between you and him in the presence of Ed Young, the proprietor of the Nevada, and Nick Barge, and other persons being present, he stated to you that he had acted as a 'stool-pigeon' before?

A. He did.

Q. And got paid for it?

A. Yes, sir.

MR. SAXTON: I move to strike out the answer of the witness and object to the question for the reason it is entirely immaterial.

THE COURT: Motion granted and objection sustained."

Assignment of Error No. XXXIV. Tr. pp. 192 and 193.)

XXVI.

That the court erred in refusing to permit defendants to prove the conversation referred to in the last assignment of error by the witness Ed Young and the witness Nick Barge, as follows:

"MR. GRIGSBY: We offer to prove the same conversation by Ed Young and Nick Barge.

MR. SAXTON: Same objection.

THE COURT: Objection sustained."

Assignment of Error No. XXXV. (Tr. p 193.)

XXVII.

That the court erred in refusing to grant the motion made by the defendants that the court direct a verdict of "Not guilty" as to each of the defendants for the crimes charged in the indictment, and both of them, for the reason that there is no evidence of any gambling for money except that of the witness N. B. Nelson, who is a self-confessed accomplice, the statute of Alaska providing that a

conviction cannot be had upon the uncorroborated testimony of an accomplice.

Assignment of Error No. XXXVI. (Tr. p. 193.)

XXVIII.

That the court erred in refusing to permit the defendants to put in evidence the transcript of the proceedings of the United States Commissioner's Court for the Nome precinct, Second Division, Territory of Alaska, in the case of the United States of America versus Ed Johnson, A. C. Laird and others, for the purpose of showing that the defendants, and each of them, had already been tried for the precise offense charged in the indictment.

Assignment of Error No. XXXVII. (Tr. pp. 193, 194.)

XXIX.

That the court erred in refusing to permit the defendants to prove certain facts by the witness, Mr. Saxton, the U. S. District Attorney, as follows:

> "MR. GRIGSBY: I now offer to prove by Mr. Saxton, the District Attorney, the proceedings which took place at the preliminary hearing and to show by him that the defendants have already had a trial for the precise crimes charged in the indictment, the witness Saxton being present in the court.
>
> MR. SAXTON: Same objection.

THE COURT: Objection sustained."

Assignment of Error No. XXXVIII. (Tr. p. 194.)

XXX.

That the court erred in permitting the U. S. Attorney F. M. Saxton, in his address to the jury, to comment as follows:

> "Gentlemen of the Jury, the witness, Charles Mason, one of the men who was arrested together with the defendants in this action, has been sworn as a witness in this case, and when asked with reference to what was going on in the Arctic Billiard Parlor at the time of the arrest, in his presence, refused to answer on the ground that said answer might tend to criminate him. Gentlemen of the jury, what was going on there at that time that he was unwilling to tell about for fear it might incriminate him? You know perfectly well what was going on. There was a crime being committed there and you know perfectly well what crime it was."

Assignment of Error No. XL. (Tr. p. 195.)

XXXI.

That the court erred in giving the jury the following instruction, being a portion of Instruction No. 4, as follows:

> "It is the duty of the Judge of this court to instruct you upon the law applicable to the case, and the statute makes it your duty to accept as law what is laid down by the court as such in these instruc-

tions, and if you should knowingly refuse to do so you would be liable as for contempt of court."

Assignment of Error No. XLI. (Tr. pp. 195, 196.)

XXXII.

The court erred in giving the following instructions to the jury, being instruction No. 5½.

"I instruct you that the testimony of one witness, if believed by you, is sufficient to establish any material fact in the case unless such witness is an accomplice. If you believe from the evidence that the witness N. B. Nelson was employed by the United States Marshal for this division to engage in the apprehension of persons violating the law by gambling, and that in pursuance of said employment the said Nelson engaged in a gambling game, if any with the defendants, then I instruct you that said Nelson is not an accomplice with the defendants, and you should give his testimony the same weight and consideration as you would have done if he had been present and had testified to the same matters without participating in the game.

"On the other hand, if you believe from the evidence that the said witness N. B. Nelson was not employed by the United States Marshal or that he did not engage in the gambling game, if any, with the defendants for the purpose of apprehending them, then I instruct you that he was an accomplice and his testimony connecting the defendants with the game, if any, must be corroborated by some other evidence

which tends to connect the defendants with the game. However, his testimony as to the character and elements of the game need not be corroborated even though he be an accomplice. In other words, the testimony of an accomplice is sufficient, if you believe it, to establish that a certain game played with cards for money, checks, chips or credits of value was being played at a certain time and place, without any corroboration whatever. But his testimony as to who was engaged in or connected with the game, if any, must be corroborated by some other evidence tending to connect the defendants with the game.

"Hence, the testimony of said witness, N. B. Nelson, whether you find that he was an accomplice or not, if you believe it, is sufficient to establish the kind of a game that was being played, if any; the means or instrumentalities used in playing such game, if any; and the nature and the value of the 'stakes' for which such game was being played, if any. However, his testimony, if any, connecting the defendants with the game, must be corroborated as heretofore stated, in case you find him to be an accomplice, but not otherwise."

Assignment of Error No. XLII. (Tr. pp. 196, 197.)

XXXIII.

That the court erred in instructing the jury as follows, being Instruction No. 5½A.

"The government has introduced certain evidence in this case tending to show that the defendants were playing for certain

chips on which the value in trade of each chip is printed. I instruct you that the printing of each of such chips is sufficient evidence to establish the value thereof, since no evidence has been introduced to explain or contradict the printing thereon."

Assignment of Error No. XLIII. (Tr. pp. 197, 198.)

XXXIV.

That the court erred in instructing the jury as follows, being Instruction No. 7:

"The owner or lessee of a building or room cannot lease or sub-let such building or room for an unlawful purpose or knowingly permit it to be used for an unlawful purpose without being held guilty of the commission of the unlawful act or acts transpiring in such building or room. If you should find from the evidence in this case that one of the defendants held the room in which gambling is alleged to have been conducted under a lease from the owner, and you further find that gambling as alleged was being conducted there, then I instruct you that such owner or lessee is guilty if he knew that such gambling was being carried on there whether he had any connection with the game or not.

"It follows, therefore, that if you find gambling was being carried on in the room known as the Arctic Billiard room or Parlor, and that said room was being held by defendant under a lease from the owner, either oral or written, then I instruct you

that such defendant is guilty if he knew that such room was being used for the purpose of gambling, and a game of stud poker or pangingui played with cards for money or chips of value was had in said room on the night in question, and the owner of said room is likewise guilty under same conditions if he knew them to exist.

"Again, if you find that the game of stud poker or pangingui was played with cards for money or chips of value on the night in question, in said room, and the defendant had anything to do with said game such as dealer, player, owner, proprietor or employee, then I instruct you that the defendant is guilty, and it does not matter whether he was the lessee or owner of said room and had previous knowledge of said game or not."

Assignment of Error No. XLIV. (Tr. pp. 198, 199.)

XXXV.

That the court erred in instructing the jury as follows, being Instruction No. 8:

"I have permitted evidence to be introduced in this case tending to show gambling to have been carried on in the room known as the Arctic Billiard room at other times prior to the time alleged, for the purpose of establishing the knowledge of the owner and lessee of said room that gambling was being carried on there, and you should consider it for no other purpose. As to what extent such testimony tends

to show such knowledge on the part of the defendant is for you to determine."

Assignment of Error No. XLV. (Tr. p. 199.)

XXXVI.

That the court erred in instructing the jury as follows, being Instruction No. 9:

> "There has been some testimony tending to show that the defendant, Ed Johnson has made statements to the effect that he intended to gamble in spite of law and the efforts of officials to stop him. You should consider his testimony only in determining the guilt or innocence of said defendant, Ed Johnson. You should not consider it as affecting the guilt or innocence of the other defendants."

Assignment of Error No. XLVI. (Tr. p. 300.)

XXXVII.

That the court erred in refusing to give the following instruction requested by defendants:

> "You are instructed that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendants with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or of the circumstances of the commission."

Assignment of Error No. XLVII. (Tr. p. 200.)

XXXVIII.

That the court erred in refusing to give the following instruction requested by the defendants:

> "You are instructed that if you believe from the evidence in this case the witness N. B. Nelson, to have been an accomplice of the defendants, or any of them, with relation to the crime or crimes charged in the indictment, then you are instructed that unless the evidence of the witness N. B. Nelson with relation to the crime charged be corroborated, by other evidence tending to show that the defendants, or some of them, actually played cards for money, then you should acquit.
>
> It is not sufficient, in case you find N. B. Nelson to have been an accomplice, that his evidence be corroborated with respect to matters which do not necessarily involve the guilt of the accused. He must be corroborated in matters which bear directly upon the guilt of the accused of the offense of gambling."

Assignment of Error No. XLVIII. (Tr. pp. 200, 201.)

XXXIX

That the court erred in refusing to give the following instruction requested by the defendants:

> "The indictment in this case charges the defendants with having played certain games of cards for money at the time and place charged in the indictment. If you are satisfied from the evidence that the defendants, or any of them, did actually play the game of cards mentioned in the

indictment at the time and place charged, then it will be for you to determine whether or not such a game or games were played for money or representative of value, and in determining this necessary element of the crime charged, you are instructed that a conviction cannot be had upon the uncorroborated testimony of an accomplice, and if you should find from the evidence that the witness N. B. Nelson was an accomplice and there is no other testimony in the case than his tending to prove that gambling actually took place, then it will be your duty to acquit the defendants."

Assignment of Error No. XLIX. (Tr. pp. 201, 202.)

XL

That the court erred in refusing to give the following instruction requested by the defendants:

"You are instructed that the testimony of an accomplice should be viewed with distrust."

Assignment of Error No. L. (Tr. p. 202).

XLI.

That the court erred in refusing to give the following instruction requested by the defendants:

"Evidence has been introduced in this case tending to show that one Charles Mason was present in company with the defendants at the time of the arrest of the defendants for the crimes charged in the indictment. The said Charles Mason was called as a witness for the Govern-

ment in this case and refused to answer certain material questions propounded to him, basing his refusal on the ground that his answer to the questions might tend to criminate him.

"You are instructed that you are not to draw any inference prejudicial to the defendants in this case on account of said refusal on the part of said Mason to answer such questions, and such refusal should in no way be considered by you in determining the guilt or innocence of the defendants, or any of them."

Assignment of Error No. LI. (Tr. pp. 202, 203).

XLII.

That the court erred in refusing to give the following instruction requested by the defendants:

"You are instructed with reference to a certain stipulation introduced in evidence in this case and marked Plaintiff's Exhibit 'H,' which stipulation is to the effect that certain witnesses, if present, would refuse to answer any material questions propounded to them, basing their refusal on the ground that their answers to such questions might tend to criminate them, that such stipulation has no probative force whatever and should not be considered by you at all in determining the guilt or innocence of the defendants, and that if the witnesses mentioned in said stipulation had been present in court and refused to answer on the grounds mentioned, such refusal would

in no way tend to prove the guilt of the defendants."

Assignment of Error No. LII. (Tr. p. 203).

XLIII.

That the court erred in refusing to give the following instruction requested by the defendants:

"You are instructed that the defendants are presumed to be innocent until their guilt is established to a moral certainty and beyond a reasonable doubt. They are clothed with this presumption, not only at the outset but during all stages of the trial and until the jury determines otherwise."

Assignment of Error No. LIII. (Tr. pp. 203, 204).

XLIV.

That the court erred in refusing to grant the following instruction requested by the defendants:

"The evidence in this case shows that E. R. Jordan paid the witness N. B. Nelson a sum of money out of his own personal funds to investigate gambling conditions in the town of Nome. You are instructed that no private person can hire another to participate in a criminal offense even though such participation be for the purpose of detecting other guilty persons and relieve such participant from criminal responsibility, therefore if you believe from the evidence that E. R. Jordan hired the witness Nelson and paid him out of his own personal funds and that the said Nelson participated in the game pursuant

to said employment, the said Nelson would be and is an accomplice of all engaged in said game."

Assignment of Error No. LIV. (Tr. p. 204).

XLV.

That the court erred in instructing the jury after they had retired to deliberate upon their verdict and had been recalled into court, as follows:

"Gentlemen of the Jury: Upon the evidence and instructions in this case you should be able to reach a verdict.

"The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions.

"Now, I shall give you a longer time for a further and more serious consideration of this case. When you retire to the jury-room again, read over the instructions of the court carefully and if there is anything about them you do not understand, so advise the court and I will endeavor to make the same plain to you. It is your duty to arrive at a verdict in the case according to the evidence and the instructions given you, irrespective of all other considerations."

Assignment of Error No. LV. (Tr. pp. 204, 205).

XLVI.

That the court erred in rendering and entering judgment against the defendants upon the verdict.

Assignment of Error No. LVI. (Tr. p. 205).

ARGUMENT

I.

The contention made in the first specification of error, viz., that the court erred in overruling the defendants' motion to quash the indictment, is based upon two grounds. First, that the action of the United States Commissioner and Justice of the Peace in refusing defendants a trial on a misdemeanor charge, of which that official had jurisdiction, deprived defendants of their constitutional right to a speedy trial, contrary to the provisions of the Sixth Amendment to the Constitution of the United States. This proposition is fully sustained by the following authorities, particularly by "*Ex parte Donnelly*" as follows:

> "After a careful consideration of this case we have finally come to the conclustion that justices of the peace have no jurisdiction to entertain preliminary examinations in cases of misdemeanor where the fine does not exceed $500.00 and the imprisonment does not exceed one year, but that they have jurisdiction to finally try and determine such cases. It therefore follows that the preliminary examination had in the present case was and is void and the petitioners are therefore entitled to be discharged."

In re Donnelly, 1 Pac. 648;
In re Crandall, 54 Pac. 686;
State v. Lund, 30 Pac. 518;
Ex parte Pruitt, 13 So. 317.

The only cases to be found which seem to negative our contention are *U. S. v. Folsom*, 3 Alaska 226, and the dissenting opinion of Judge Brewer in *Ex parte Donnelly*. The latter, however, has not been followed by any court, while the majority opinion is cited with approval by numerous authorities, including those above cited.

In the case of *U. S. v. Folsom*, 3 Alaska 226, the decision of the court was based upon the fact that the prosecution was under a special statute, viz., Section 474 of Carter's Code; Section 2583 of Compiled Laws of Alaska. The case recognizes the principle that in ordinary misdemeanors the justice of the peace having jurisdiction should proceed to try the case, and in no way conflicts with the authorities above cited.

Second, that the proceedings before the magistrate who bound the defendants over to the District Court did in fact constitute a trial and jeopardy of the defendants. This question is also raised by the defendants' plea to the indictment of former jeopardy. In support of this contention we cite:

Brown v. State, 16 So. 929.

The above case is decisive of the question.

The reason the question of former jeopardy was raised on the motion to quash is that the laws of Alaska prescribe that former jeopardy must be pleaded by pleading either a former judgment of conviction or acquittal of the crime charged. It

was exceedingly difficult for the counsel for the defendants to determine whether to view the proceedings before the Justice of the Peace as constituting a conviction or acquittal. Therefore the question was raised both by plea of former jeopardy and by a motion to quash.

In the motion to quash and affidavit in support thereof, the denial to the defendants of a speedy trial is not assigned as a ground for such motion. However, we assume that the facts set up in support of the motion will be taken as constituting the real reasons why it should have been sustained. The facts show that the defendants were charged with the commission of a misdemeanor, to-wit, the crime of gambling. The complaint is in the ordinary form of complaints usually filed in Justice Court. The proceedings for the trial of criminal actions in Justice Court are set forth in Chapter 42, Sections 2520-2549, Compiled Laws of Alaska. The U. S. Attorney, however, proceeded to treat the case as brought under the provisions of Chapter 34, page 756, and, upon his advice, the U. S. Commissioner and *ex officio* Justice of the Peace refused to grant the defendants a trial, but proceeded to treat the case as a preliminary hearing and at its conclusion bound the defendants over to the District Court. This proceeding resulted in their being compelled to give bail and in their being held up to the public for several months as accused

persons, in spite of the fact that all the evidence to be used in their prosecution was available to the District Attorney. This is not only an illegal method of proceeding in misdemeanor cases, but carries in its train many evil consequences. If this procedure can be used in a gambling case, it can be used in any other misdemeanor case,—in a case of simple assault, in a case of trespass, where the limit of punishment is a fine of $50.00. The grand jury in the Second Judicial Division of Alaska never sits more than twice a year, and not necessarily more than once a year. It is a necessary evil that persons accused of felonies must endure the hardship of waiting for a trial until they have been indicted by a grand jury,—a hardship that has been avoided by most of the State Constitutions. In Alaska, however, this hardship cannot be avoided in felony cases, for the reason that the Constitution of the United States requires that no person shall be tried for a felony except upon a previous indictment by a grand jury. In misdemeanor cases, however there is no excuse for such a practice. It is not necessary and is capable of great abuse. It is not sustained by any authorities in any court.

II.

The second, third, fourth, fifth, sixth and seventh specifications of error relied upon relate to the fact that six separate continuances were granted to the United States upon the statement of the

District Attorney to the effect that the attendance of certain witnesses could not be procured.

Section 2221, Compiled Laws of Alaska, is as follows:

> "That when an indictment is at issue upon a question of fact, and before the same is called for trial, the court may, upon sufficient cause shown by such affidavits as the defendant may produce, or the statement of the District Attorney, direct the trial to be postponed to another day in the same term or to another term; and all affidavits and papers read on either side upon the application must be first filed with the clerk."

The proceedings with reference to the granting of these continuances are fully set forth in the transcript of record, pages 38 to 43. It must be apparent from a reading of the account of these proceedings that the defendants were greatly prejudiced thereby. It is true that the section above quoted justifies the continuance of any criminal action after indictment to another day in the same term or to another term, and that the statement of the District Attorney, that official being under his official oath, is taken as a sworn statement. It does not follow, however, that the District Attorney is clothed with the power which will justify the court in allowing the case to be repeatedly and indefinitely continued, with the result that the defendants are compelled to keep, not only themselves, but their witnesses at hand day after day upon the

statement of the prosecuting officer that he has been unable to find certain witnesses which the Government deems necessary for the prosecution of the case. It will be seen from the transcript that the District Attorney was repeatedly requested to move for a continuance of the case to some day certain and far enough ahead so that he would be able to secure the attendance of the Government witnesses if they could possibly be procured. This he refused to do. Some discussion followed and the attitude of the court was plainly shown by the court's remark, as follows:

> "MR. O'NEILL: I think the District Attorney should be compelled to set this case far enough ahead so he can get his witnesses here.
>
> THE COURT: I don't care to hear any argument in this case. As long as there is any possibility of finding these witnesses I am going to continue this case over from day to day and that possibility will be determined by the information I get from the District Attorney." (Tr. p. 39).

Following that, several additional continuances were granted from day to day on the ground, as stated in the transcript, that the marshal reported that he was still unable to find the missing witnesses. It is apparent from the fact that the District Attorney requested the case to be continued from day to day that the witnesses he expected to find were near at hand; also that their precise

whereabouts was unknown to the Federal authorities, otherwise it would have been possible for the District Attorney to fix a day when he would be ready to proceed to trial. The attitude of the court and the other proceedings, as shown by the transcript of record, must necessarily have left an impression in the minds of the petit jury, who may be presumed were present during all the proceedings, as well as the general public, that some attempt had been made by the defendants or their attorneys to prevent the attendance of the witnesses sought by the Government. No showing, however, was made by the District Attorney as to any of these matters. The statement of counsel for the defendants (Tr. p. 41) describes the situation as it existed at the time, and is as follows:

> "MR. GRIGSBY: Now if the court please, there has been no showing made by the District Attorney to the effect that defendants are in any way in fault in this matter, or their counsel, and these defendants have been here every day for seven days. They are indicted, they are presumed to be innocent, they are not culprits, they should not be held up to the community as culprits, they have a right to a speedy trial unless there is some ground for refusing them. In any event they should not undergo the hardship of being hauled up here day after day. When this case is continued for a day it is continued for trial and they have to be here. Now the District Attorney should show the court when he will be ready

and not continue this case indefinitely. He has made no showing whatever in the premises. It looks very much as if there was an attempt to punish these defendants who have not been convicted of anything because the State has not got these witnesses. I very much doubt if your Honor has any jurisdiction to compel them to attend court day after day in the absence of any showing. The District Attorney hasn't shown he will be ready, that he expects to be ready, or taken steps that he can be ready and he should not ask to have this case set for a day when he doesn't know whether he will be ready for trial or not. Let him announce the day he will be ready. We have some rights, legal rights. Supposing on the part of the defendants I come up here and say, 'I cannot get my witnesses, they are hiding somewhere,' would your Honor grant a continuance indefinitely from day to day to these defendants? We have as much right as the prosecution in that regard and we insist at this time that this trial proceed this morning.

THE COURT: The case will go over until Wednesday morning at 10 o'clock.

MR. GRIGSBY: I wish to make a motion in this case. The defendants, and each of them, move that this prosecution be dismissed for the reason that defendants have not been accorded a speedy trial in accordance with their constitutional rights and we object to any continuance.

THE COURT: Motion overruled.

To which ruling of the court defendants excepted and an exception allowed."

We contend that in the granting of separate continuances above referred to error was committed, not only in depriving defendants of a speedy trial, but in prejudicing them before the jury and community. The truth of this contention seems so apparent that we deem it unnecessary to cite authorities to sustain it.

III.

The eighth specification of error relates to the overruling by the court of the motion made by the defendants that a special officer be appointed to serve the special venire issued herein upon the 26th day of April, 1916. The motion and affidavit in support thereof are set forth in the transcript of record, pages 43 to 46. Argument on the motion may be found in the transcript of record, pages 46 to 49. This specification of error relates to Assignment of Error No. IX (Tr. pp. 173-176).

Section 803, Revised Statutes, is as follows:

"Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the case, by such fit person as may be specially appointed for that purpose by the court, who shall administer

to him an oath that he will truly and impartially serve and return the writ."

Section 804, Revised Statutes is as follows:

> "When from challenges or otherwise there is not a petit jury to determine any civil or criminal case, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the by-standers sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section."

It appears from the affidavit in support of the motion that a special officer be appointed to complete the jury panel that there had been a previous trial of the defendants which resulted in a disagreement. At the previous trial, the only witnesses against the defendants of any consequence were several deputy marshals and a person employed by the United States Marshal to act as a spy or informer and, in such capacity, to engage in a game of cards for money with the defendants and furnish information to the United States Marshal upon which to base a prosecution; that the prosecution wholly originated in the Marshal's office; that at least one of the deputy marshals had threatened the defendants; that the defendants were arrested

without a warrant by the deputy marshals on information furnished by one N. B. Nelson, who had been employed by the United States Marshal for that purpose; that the marshal had paid the said N. B. Nelson with his own private funds. When the case came up for the second trial and the regular panel became exhausted, it became necessary to complete the same by ordering a special venire. We contend that the proceedings with respect to the special ventire or venire facias are controlled in Alaska by provisions of the sections of the Revised Statutes above quoted. Whether or not this is true, the principle that the summoning officer must be disinterested and impartial is equally applicable. One of the leading cases on this question is *Koontz v. State*, 10 Okla. 553, Ann. Cas. 1916 A, 689. This case contains a review of the authorities on the subject. Several authorities are cited therein which disqualify a summoning officer on the ground that he is a witness for the prosecution.

State v. Kent, 4 N. D. 601.

The United States Marshal in the case at bar was a witness for the prosecution, also several of his deputies. Not only that, he had spent his own money to secure evidence. It is in accordance with all the laws of human nature that he was interested in securing a conviction.

> "It is essential to the fair and impartial administration of justice that an

open or special venire shall be summoned by an officer who is not disqualified by reason of interest, bias, or prejudice."

Harjo v. U. S., 98 Pac. 1021.

(See, also case note to *Koontz v. State*, Ann. Cas. 1916 A, 693).

The following from the case of *Woods v. Rowan*, 5 Johns. 133, is applicable:

"It is true that the sheriff no longer selects the whole panel, and that it now is his duty to summon all such persons as shall have been previously balloted by the clerk; and hence it is argued, that the challenge to the array in this case, was properly overruled. I cannot accede to this conclusion. The sheriff certainly may select such of them as he may suppose will best subserve his purpose, and by summoning them, and omitting to summon the rest, he may in many cases as effectually pack a jury as if he had the power of selecting the whole panel. The impartial and equal administration of justice renders it dangerous to trust the sheriff with such a power. It is no answer to this objection to say that it is not to be presumed the sheriff will prostitute his office to such purposes. It is because he may do it, that the law interposes; and if he may, that is decisive of the question."

In the following cases, the fact that the sheriff had formed an unqualified opinion of the

guilt of the defendants was held ground for challenge:

People v. Coyodo, 40 Cal. 586;
People v. LeDoux, 102 Pac. 517;
People v. Vasquez, 99 Pac. 983;

We cannot conceive of a clearer case of disqualification of a summoning officer than the present one, nor how it can be contended that the United States Marshal in this case was an indifferent person, within the meaning of Section 803, Revised Statutes.

IV.

The ninth and tenth specifications of error relate to the denying and overruling by the court of a challenge for cause made by the defendants to the juror W. P. Pearson. The examination of the Juror Pearson is set forth on pages 51 to 62 of the transcript of record. After testifying that he had a fixed opinion in the case as to the guilt or innocence of the defendants which it would take evidence to remove, the juror testified as follows:

> "Q. Now you are sure that you have a fixed opinion as to the guilt or innocence of some of the defendants. I will ask you if you were charged with the crime of gambling if you would be satisfied to be tried by a juror in your present frame of mind as regards this case?
>
> A. Well, no, I don't think I would.

Q. Do you think it would be fair to be tried by jurors in your present frame of mind?

A. No, sir.

* * * * *

Q. Supposing every juror here had your present fixed opinion relating to the guilt or innocence of these defendants, and you were the defendant, would you be satisfied to be tried by that kind of a jury?

A. I would if I could prove I was innocent.

Q. If you could prove you were innocent?

A. Yes, sir."

These questions and answers indicate the frame of mind of the juror. To be sure, he answered several of the usual cut and dried questions propounded by the court and by the District Attorney, most of which questions were leading, to the effect that he could lay aside his opinion and try the case solely on the evidence, and would, if sworn as a juror, so do. On his direct examination as to his qualifications when questioned by the District Attorney this juror absolutely qualified to sit on the case. His cross-examination, however, reveals so plainly his unfitness to try the case that little argument is necessary. We submit this assignment of error upon the record.

V.

The 11th specification of error relates to er-

rors of the court committed with respect to the examination of the witness E. R. Jordan, the United States Marshal, who testified in behalf of the Government. His testimony is set forth in full on pages 90 to 93 of the transcript of record. He answered seven distinct and separate questions propounded by defendants' counsel by saying, "That is my business." The particular question to which defendants' counsel insisted upon an answer relating to the employment by the witness Jordan of the man Nelson, who was employed by Jordan to investigate gambling in Nome. (See Tr. p. 90). The question was as follows:

> "Q. Why did you pay him out of your private funds?
>
> A. That is my business.
>
> MR. O'NEILL: Now, if your honor please, I am not going to stand for the impudence of this witness.
>
> THE COURT: I don't think the witness is impudent. Take your seat. He has a right to pay his own money if he wants to.
>
> MR. O'NEILL: I have a right to know why he paid his own money to show the animus of the witness, if any there be.
>
> THE COURT: He has stated because he chose to do so.
>
> MR. O'NEILL:—He said it was his business. I want to know why he chose to do so."

We are not aware that the United States Marshal has any more privileges and exemptions

when on the witness stand than any other citizen. He was a witness for the Government. His motives and prejudices were matters of legitimate inquiry by the defendants' counsel. It appears that, for the purpose of investigating certain suspected violations of the law relating to gambling, he employed a detective out of his own personal funds. Why he was so interested in this particular line of investigation as to incur personal expense was a matter which the jury was entitled to know. It was not provileged. That the court should have compelled the witness to have answered the question set forth above is so self-evident that there is no need of authority on the proposition.

The attitude of the witness Jordan during his entire cross-examination must also reveal to the court that he was a totally unfit person to be intrusted with the duty of selecting jurors to try case, which matter is completely discussed in the argument relating to the eighth specification of error. A further discussion under this head is probably out of place, except that if it is apparent to the court from the general conduct of the case from beginning to end that the defendants were not accorded a fair trial, this court will consequently look carefully into the errors assigned, some of which, taken by themselves, may seem somewhat trivial. With respect to the examination of the United States Marshal Jordan the defendants were practically denied the right of cross-examination.

VI.

The 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th specifications of error are among those which might be classed as trivial and, by themselves, probably not worth discussion. They are relied upon for the purpose announced above of showing the court that the general conduct of the trial was distinctly unfavorable to the defendants.

VII.

The 21st, 22nd and 23rd specifications of error relate to the refusal of the court to permit the defendants to propound certain impeaching questions to the witness N. B. Nelson on cross-examination. These questions related to his testimony given at the first trial of the defendants. It was sought to prove that on the first trial of the defendants the witness Nelson made certain statements inconsistent with his testimony at the second trial. Upon the questions being propounded to Nelson, the United States Attorney produced a certain document which he claimed to be a transcript of Nelson's former testimony. The cross-examination of Nelson (Tr. pp. 106, 107) clearly shows that Nelson's testimony at the previous trial was oral. It appears that it had been taken down in shorthand by some person in the employ of the United States Attorney, transcribed and signed by the witness. The United States Attorney objected to

the impeaching questions on the ground that the testimony of the witness had been reduced to writing and signed by him and that the writing must be exhibited to the witness before he could be examined with respect to any statements made therein. To sustain this contention, he relies upon Section 1502 of the Compiled Laws of Alaska, which is as follows:

> "Section 1502. A witness may also be impeached by evidence that he has made at other times, statements inconsistent with his present testimony, but before this can be done the statements must be related to him with the circumstance of times, places and persons present, and he shall be asked whether he had made such statements and, if so, allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them."

The United States Attorney (Tr. p. 107) relied upon *State v. Crockett*, 65 Pac. 447. In that case the witness was being examined with reference to a written statement of his testimony previously given orally at a coroner's inquest which was reduced to writing, and the court held that the witness could not be examined with reference to such testimony without first being shown the writing. In such a case, however, the testimony given before the coroner is by law required to be reduced to writing and has a certain legal effect as prima facie evidence of what the witness swore to and

is generally required to be signed by the witness. No case can be found, however, where the right to test the recollection of a witness or his credibility can be prejudiced by the simple fact that, without any authority of law, some person has reduced his oral testimony to writing and caused him to sign it. The typewritten transcript produced by the District Attorney could have no more legal effect in abridging the right of cross-examination than the written statement of any person's testimony taken down by any person. The witness was being questioned as to previous oral statements. He was confronted with questions which implied that his previous testimony was not in accordance with his present testimony. To safeguard him from being broken down and having his credibility destroyed, the District Attorney influenced the court to misapply the law as announced in Section 1502. This is another instance in the trial of the right of cross-examination being unwarrantably restricted by the court, to the prejudice of the defendants, and one of the errors which cannot be classed as trivial.

VIII.

The 24th specification of error relates to the admission in evidence of a certain stipulation offered by the Government, to the effect that if the Government had been able to produce certain witnesses on the trial they would have refused to testify with respect to any material facts in the

case, on the ground that such evidence would tend to incriminate themselves. The stipulation is as follows:

"IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, SECOND DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED JOHNSON, A. C. LAIRD, FRANK KOIBETITZ, JOHN MOVOSEL, NICK SKORLICH, ALFRED PIERSON, ADELBERT G. GUMMAER,

Defendants.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys as follows:

1. That after diligent effort the United States is not able to produce, at the trial of this cause, the following witnesses, to-wit: A. Hanson and Elmer Adams.

2. That each of said witnesses, if produced as a witness on the trial of this cause, would refuse to testify to any of the material facts in this cause upon the ground that such evidence would tend to incriminate himself.

3. That this stipulation may be considered in evidence and read to the jury upon the trial of this cause.

F. M. SAXTON,
United States Attorney.
G. B. GRIBSBY,
HUGH O'NEILL
Attorneys For Defendants."

It will be noted that the third paragraph of this stipulation provides that the stipulation may be considered in evidence and read to the jury upon the trial in this case. In spite of this provision, however, the defendants' counsel objected to its admission on the ground that the same was immaterial. At the time of the introduction of the stipulation, counsel for defendants waived any constitutional rights that defendants might have as to the right of the defendants to be confronted with the witnesses against them.

Notwithstanding this waiver, and notwithstanding the provisions of the stipulation that the same might be read in evidence, we are of the opinion that the court erred in allowing its admission. It evidently was introduced for the purpose of prejudicing the jury against the defendants. It was no doubt intended by the United States Attorney that the jury would draw the inference from the refusal of the witnesses A. Hanson and Elmer Adams to testify on the ground that their testimony might criminate themselves that the defendants were guilty of some crime. The law allows no such inference to be drawn, nor does the law permit defendants to be bound by any waiver of their constitutional rights. The admission of such a stipulation in evidence was prejudicial error.

Beach v. U. S., 46 Fed. 754;
Wigmore on Evidence, Vol. 4, Sec. 2272, p. 3147;

People v. Maunausau, 26 N. W. 797.

It must be apparent to the court, when it is noted that witnesses A. Hanson and Elmer Adams were two of the missing witnesses on account of whose absence several continuances of the case were granted, that the defendants' counsel were forced to enter into the stipulation in order to obtain a trial. After being compelled to come into court day after day, and being threatened by the announcement of the court that they would continue to be thus forced to come into court day after day indefinitely until certain witnesses were procurred, in order to escape the hardship of such treatment, they were forced to enter into a stipulation waiving their constitutional rights and consenting to the admission of immaterial and prejudicial matter. The court must be impressed with the extreme unfairness of the conduct of the trial of the case at bar in this and other respects.

IX.

The 25th and 26th specifications of error relied upon relate to the error of the court in striking out certain testimony of Merrill Beatty, a witness testifying on behalf of the defendants, whose testimony impeached that of the Government witness N. B. Nelson. Proper foundation for the impeaching question was laid in the cross-examination of Nelson (See Tr. p. 102). Comment seems unnecessary.

X.

The 27th specification of error relates to the refusal of the court to grant the motion made by the defendants at the conclusion of the Government's case that the court direct a verdict of not guilty as to each of the defendants of the crimes charged in the indictment. This motion was based upon the ground that the witness N. B. Nelson, according to all the evidence in the case, was an accomplice of the defendants. The laws of Alaska provide that a conviction cannot be had upon the uncorroborated testimony of an accomplice. Section 2262, Compiled Laws of Alaska, is as follows:

> "That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission."

The question as to whether participants in a game of cards played for money are accomplices of each other in the crime of gambling is one on which the authorities differ, some holding that they are, and others that they are not, accomplices. The latter authorities maintain that each participant is guilty of an independent crime. How this conclusion can be arrived at is difficult to understand, for no person can gamble by himself. There must

be at least two persons engaged to constitute a game, whether for money or otherwise.

In *Davidson v. State*, 33 Ala. 350, in discussing this question, the court says:

> "Our argument does not involve the position that adversaries in fact are accomplices in law; antagonists in playing cards are not adversaries as to the thing which constitutes the offense. They agree together as to the playing at a game with cards and each voluntarily contributes to that end and they are adversaries as to which shall perform his part in the game with the highest skill. There is a perfect agreement among the players that each shall perform his part, and the strife between them is which shall do it most skilfully."

The general test as to what constitutes an accomplice is whether or not the person in question could have been convicted as a principal.

> "To constitute an accomplice one must be so connected with a crime that at common law he might himself have been convicted either as the principal or as an accessory before the fact."

People v. Bright, 96 N. E. 362.

> "The acts of at least two persons concurring together are necessary to effect a violation of the statute, and I have no doubt there is such a connection between dealer and the party who bets as to constitute one the accomplice of the other. Both are necessary, and each performs his

> part of the acts which the law denounces as criminal, and the fact that each is punished for the part he performs can make no difference. The crime could not be committed without the concurrent acts of both."

State V. Light, 21 Pac. 132.

The testimony of N. B. Nelson (Tr. p. 112) shows that he was hired by the United States Marshal to investigate gambling in the Town of Nome. The testimony of the United States Marshal, E. R. Jordan (Tr. p. 90), is to the effect that he employed Nelson "to go down town and look up any gambling and report to Mr. Holland at the office." Nelson testified that he played for five or six nights with the defendants before making any report; that the only reason he failed to make a report before the sixth night was that during the whole week there never was a game that he did not fear would break up if he left it to report to the Marshal. It seems from this testimony that there would have been no game had Nelson not been employed to ferret out gambling. It does not appear from the testimony of either Nelson or Jordan that Nelson was expected to participate in any game. He was employed to look up any gambling—not to gamble. He gambled with the defendants; he was arrested with them and was equally liable to prosecution with the rest of the defendants. The instructions of the court to the jury were to the effect that if the witness Nelson was employed by the United

States Marshal to engage in the apprehension of persons violating the law by gambling and that, in pursuance of such employment, the said Nelson engaged in a gambling game, that then the said Nelson was not an accomplice with the defendants. (See Assignment of Error No. XLII., (Tr. p. 196). The instruction goes on to state, however, that if the witness Nelson was not so employed by the United States Marshal and did not engage in the gambling game for the purpose of apprehending the defendants, he was an accomplice and his testimony should be treated as such. The lower court evidently concedes the rule to be that every participant in a gambling game is an accomplice of every other participant unless he be employed by the legal authorities to participate in the game, or at least to engage in the apprehension of persons violating the law by gambling.

But the evidence of Jordan, the United States Marshal, discloses that Jordan paid Nelson from his own private funds. Nelson was in no sense a government detective. There is no law in Alaska, nor anywhere else, which authorizes the United States Marshal or any other person to employ detectives to participate in the commission of crime with immunity from punishment on account of such employment. The lower court evidently relied on a class of cases which holds that detectives and informers who co-operate and actually engage in the commission of a crime for the purpose of ap-

prehending others, but without any criminal intent on their own part, are not subject to indictment and therefore not accomplices of their confederates. These cases all rest on the principle that such detectives and informers at no time have the criminal intent which is one of the necessary elements of the offense. For instance, a detective might join a gang of persons about to engage in a burglary, ally himself to them, and participate in the breaking into of a bank and blowing open a safe. Each of the other persons engaged would be guilty of the crime of burglary, because each had an intent to deprive the owner of the contents of the safe thereof. This element of crime certainly would be lacking in the detective, consequently he would not be punishable. To extend this principle to misdemeanors such as gambling is illogical. There is no intent involved in the crime of gambling except the intent to do the act. When a man sits in a poker game and buys chips for money, and bets, and wins or loses, he commits the crime of gambling. The fact that he has been employed so to do, even by a United States official, in his official capacity or otherwise, does not in any way relieve him from criminal responsibility. Such a consideration might influence prosecuting authorities to refrain from pressing a charge against him. We are of the opinion that both the authorities and their employee are equally guilty under such circumstance of the crime of gambling.

Nelson's testimony was the only testimony that connected any of the defendants with the commission of the crime charged. He was the only witness who swore that all sitting at the table were engaged in the game. He was the only witness who swore that the game was for money. Without his testimony there was not enough evidence, however suspicious the circumstances might be, to go to the jury. He was not only a participant in the game, but, according to his own testimony, was the main stay of the game. Without his presence there would have been no game. Under these circumstances, it seems to us that his tesimony must certainly be regarded, under the authorities, as that of an accomplice. We find no well-reasoned cases to the contrary.

We therefore earnestly contend that the court erred in overruling the motion of the defendants for a directed verdict of acquittal.

In this connection, we call attention to this motion for a directed verdict as applied to defendant Laird. Both Laird and Johnson were convicted on the second count in the indictment. The second count charges the crime of gambling by playing a game of cards called "pangingui." There is no evidence in the case on the part of any witness which connects the defendant Laird with the game of "pangingui." The testimony of the deputy marshals was to the effect that the defendant Johnson was engaged in a game of "pangingui" and the de-

fendant Laird in a game of stud poker. The testimony of the witness Nelson was to the same effect. Nelson testified that he himself participated with Laird in a game of stud poker. No witness on the part of the prosecution testified that Laird at any time participated in the game of pangingui. The testimony of Phil Holland (Tr. pp. 66, 67) was to the effect that he took certain checks or chips from the pangingui table; that stamped on the chips were the words, "The Arctic good for 12½c in trade, A. C. Laird, Prop." On other of the chips were the words, "The Arctic, good for 25c in trade, A. L. Laird, Prop." This was the only evidence connecting even the name of Laird with the pangingui game. No evidence was offered to show that the defendant Laird was the proprietor of the Arctic or had caused his name, or any person's name, to be printed on any chips. He might or might not have been proprietor of the Arctic Billiard Hall. The name "Laird" in the chips were printed. It was not in the handwriting of defendant Laird. It seems to have been treated by the court as an admission by Laird that he was proprietor of the Arctic Billiard Hall. Even such a fact, if proven, would not make him a participant in a game of pangingui which he did not actually play. It certainly is not necessary to cite authorities to sustain the proposition that no person is bound by the fact that his name appears in print on any paper or other article. Consequently, there appears to be no evidence

whatever that the defendant Laird was guilty of the crime of which he was convicted. As far as the defendant Laird is concerned, the motion for a directed verdict should have been sustained for this, if no other, reason. It should have been sustained as to both defendants if the court holds the witness Nelson to have been an accomplice.

XI.

The 28th and 29th specifications of error relate to the error of the court in refusing to admit in evidence the record of the proceedings before the United States Commissioner which was offered for the purpose of proving former jeopardy. The legal propositions involved in these specifications have been discussed with reference to the first specification of error wherein the same question is involved in the motion to quash the indictment in the case.

XII.

The 30th specification of error relates to the error of the court in permitting improper comment to the jury by the United States Attorney upon the fact that the witness Charles Mason refused to testify with reference to certain matters connected with the crime charged in the indictment on the ground that he might criminate himself. The remarks complained of are set forth in full on page 139 of the transcript of record.

It will be remembered that Charles Mason was

one of the three witnesses on account of whose absence the United States District Attorney succeeded in obtaining so many continuances of the case. The purpose of the introduction of the stipulation referred to in the 24th specification of error is plainly revealed by the aforesaid comment of the United States Attorney with reference to the refusal of the witness Charles Mason to testify on the ground that he might criminate himself. That such comment was prejudicial error if unrebuked by the court is announced clearly in

Beach v. U. S. 46 Fed. 754.

as follows:

> "The refusal of the witness to answer questions if he thought his answers would criminate himself was his constitutional right which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. Marks was called by the Government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been or might have been the effect of his testimony, had it been given, was unwarranted. The intimation even that any such inference was justifiable, as plainly is to be drawn from the charge of the court, and its permission to allow the District Attorney to argue to that effect to the jury, was cal-

culated to work injustice to the defendant and to lead the jury to yield to the suggestions and suppositions rather than to the actual evidence in the case. It would, indeed, be strange doctrine that any one could be found guilty, or even that his guilt could be seriously debated, because another party, called as a witness, who had no relations and was not a conspirator with him, or charged in the same indictment, had refused to testify in order to protect himself. There is neither reason nor authority for and such doctrine."

XIII.

The 31st specification of error relates to an instruction of the court to the jury to the effect that a failure of the jury to follow the instructions of the court as to the law would be punishable as contempt of court. Such an instruction must necessarily constitute a coercion of the jury to adopt the view of the court as to the merits of the case, if they can be ascertained. The attitude of the court throughout the entire trial of the case must necessarily have impressed the jury as somewhat hostile to the defendants. It must be remembered that this was the second trial of the case; that the first jury had disagreed. The ordinary jury is unable to distinguish between the law and facts of a case with that degree of discernment of which lawyers are capable. In connection with the later instructions of the court, there is no doubt but what the instruction complained of was prejudicial. At a later stage

of the trial, after the jury had been deliberating for two days and reported that they were unable to agree upon a verdict, the court gave them an additional instruction, which contained the following statement:

> "The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions."

Following this, the court admonished the jury to return tothe jury room and read his instructions carefully, at the same time telling them that it was their duty to arrive at a verdict in the case according to the evidence and the instructions. Counsel for defendants excepted to such last mentioned instruction on the ground that it was an attempt to influence the jury to return a verdict against their consciences. These proceedings are set forth in full on page 159 of the transcript of record.

We cannot but remark that in our view, which is unchanged by the lapse of more than a year since the trial took place, it seems evident that the District Attorney, United States Marshal, and the Judge of the court were bending every effort to secure a conviction in this case, regardless of law or justice.

XIV

The 32nd specification of error relates to an instruction of the court with reference to the character of the witness N. B. Nelson as an accomplice or otherwise. The argument with reference to the

twenty-seventh specification of error is equally applicable to this instruction.

XV.

The 33rd specification of error is with reference to the instruction of the court to the effect that the value of the chips used in the game as printed on the chips themselves was sufficient evidence to establish their actual value. This is another attempt of the prosecution to bind the defendants by printed matter without any showing that they were responsible for the same. If the words "12½c in trade" printed on a poker chip or other article are sufficient evidence to establish the value of such chip at 12½c. then the words "one million dollars" so printed on a poker chip would likewise establish its value to that amount. As far as we have been able to ascertain, the only authority having power to establish value in this manner is the United States Government.

XVI.

In the 34th specification of error we complain of the court's instruction to the effect that the owner or lessee of a building or room cannot permit it to be used for an unlawful purpose without being held guilty of the commission of the unlawful act or acts transpiring in such building or room, and further, as follows:

> "It follows, therefore, that if you find gambling was being carried on in the room

> known as the Arctic Billiard room or parlor, and that said room was being held by defendant under a lease from the owner, then I instruct you that such defendant is guilty if he knew that such room was being used for the purpose of gambling, and a game of stud poker or pangingui played with cards for money or chips of value was had in said room on the night in question, and the owner of said room is likewise guilty under same conditions if he knew them to exist."

There is no authority in law for such a proposition. Under a statute making it a crime to keep a disorderly house, the owner or lessee or person in control of such house kept in a disorderly manner is guilty of such keeping if he knew or permitted it to exist, under some of the authorities. Likewise, in jurisdictions where there is a statutory offense of keeping a gaming house, the owner or lessee or person in control of the premises is guilty of keeping a gaming house if he knowingly permits such gaming house to be kept. We have been unable to find a single authority, however, which holds that the owner of a building is responsible for a single act of gambling committed with his knowledge. There is no such offense in Alaska as keeping a gaming house. The defendants were not indicted for such an offense. The defendants might have been the lessees of the Arctic Billiard Parlor or of the building wherein it was situated. They might have had knowledge of the fact that various persons at various times engaged in gambling on

the premises. If there was such a law in Alaska, they might have been indictable under such circumstances for keeping a gaming house. There is no authority, however, to sustain the proposition that under such circumstances they were guilty, as principals, of participating in any particular game, as charged in the indictment.

XVII.

The 35th specification of error relates to an instruction of the court as to the knowledge of the owner or lessee of the room that gambling was being carried on there. The court permitted evidence of other acts of gambling to be introduced for the purpose of showing this guilty knowledge. There was no evidence in the case to the effect that any of the defendants were lessees of the room where the gambling was alleged to have been committed, as distinguished from the entire building. Their prior knowledge or present knowledge of the prevalance of gambling might have been very prejudicial in the minds of the jury, but in no way revelent to the crime charged in the indictment.

XVIII

The 37th specification of error relates to the refusal of the court to instruct the jury with reference to the weight of the testimony of an accomplice. The instruction requested, as set forth in the specification of error, is an exact quotation of Section 2262, Compiled Laws of Alaska. It is not cov-

ered by any of the other instructions of the court. Comment is unnecessary.

XIX.

The 38th and 39th specifications of error relate to the refusal of the court to instruct the jury with reference to the application of Section 2262, Compiled Laws of Alaska, to the case on trial.

XX.

The 40th specification of error relates to the refusal of the court to give the following instruction requested by the defendants:

> "You are instructed that the testimony of an accomplice should be viewed with distrust."

Paragraph 4 of Section 1505, Compiled Laws of Alaska, is as follows:

> "4. That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution."

XXI.

The 41st specification of error relates to the error of the court in refusing to instruct the jury to the effect that they were not to draw any inference prejudicial to the defendants on account of the refusal on the part of the witness Mason to answer certain questions which he refused to answer on the ground that his answers might tend to criminate him. This proposition is fully discussed in relation

to the 30th specification of error, and the authorities there cited in support thereof are again referred to.

XXII.

The 42nd specification of error involves the same legal proposition as the 30th and 41st specifications of error.

XXIII.

As to the 43rd specification of error relating to the refusal of the court to give a certain instruction with reference to the presumption of innocence, we are unable to find the equivalent thereof elsewhere in the court's instructions.

XXIV.

The 44th specification of error involves the same propositions of law as are fully discussed with reference to the 27th specification of error.

XXV.

As to the specification of error No. 45, we pointed out the vice of the instruction therein complained of in discussing the 31st specification of error, and it is unnecessary to repeat the same.

CONCLUSION

It is respectfully submitted that the record discloses the conduct of the trial in this case to have been distinguished by egregious errors, several extremely prejudicial, others of less importance; that

the defendants have not been accorded a fair trial.

We do not entirely disagree with the "Court's Remarks on Gambling Generally" which have been interpolated into the record (Tr. p. 29) without our fault or consent. The purpose of their insertion in the record is not apparent, unless it was hoped that the appellate court might be influenced by some other consideration than the merits of the legal problems presented.

To one reading the record, it would seem that the attitude of the court toward the crime of gambling generally found sufficient opportunity for expression during the trial, as manifested by its rulings, and that there was no necessity for the special ebullition after the jury retired. However, this may be, we respectfully assure this court that the community residing at Nome, Alaska, is no such hotbed of vice that its suppression is justified by a judicial disregard of the forms of law, rules of evidence and safeguards with which the law surrounds persons accused of crime.

Resepctfully submitted,

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